

ESTTA Tracking number: **ESTTA309053**Filing date: **09/30/2009**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

Name	Dymatize Enterprises, Inc.		
Entity	Corporation	Citizenship	Texas
Address	13737 N. Stemmons Freeway Farmers Branch, TX 75234 UNITED STATES		

Attorney information	Casey L. Griffith Carstens & Cahoon, LLP P.O. Box 802334 Dallas, TX 75380 UNITED STATES tmdocketing@cclaw.com, griffith@cclaw.com, braxton@cclaw.com, jenkins@cclaw.com, reynolds@cclaw.com Phone:972.367.2001
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**Registration Subject to Cancellation**

Registration No	3536481	Registration date	11/25/2008
Registrant	Supplement Services, LLC 10 Canfield Road Cedar Grove, NJ 07009 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 005. First Use: 2008/03/01 First Use In Commerce: 2008/03/01  
All goods and services in the class are cancelled, namely: Dietary supplements


**Grounds for Cancellation**

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Priority and likelihood of confusion	Trademark Act section 2(d)

Related Proceedings	Case 3:09-cv-01840-G; Dymatize Enterprises, Inc. v. Maximum Human Performance, Inc., Gerard Dente, and Supplement Services, LLC d/b/a MuscleMeds, in the United States District Court for the Northern District of Texas, Dallas Division
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**Mark Cited by Petitioner as Basis for Cancellation**

U.S. Registration No.	2629349	Application Date	07/02/2001
Registration Date	10/01/2002	Foreign Priority Date	NONE

Word Mark	DYMA-BURN
Design Mark	
Description of Mark	NONE
Goods/Services	Class 005. First use: First Use: 1999/02/25 First Use In Commerce: 1999/04/07 Dietary and Nutritional Supplement

Attachments	76279228#TMSN.gif ( 1 page )( bytes ) Petition to Cancel. - Dymatize v. MuscleMeds - ADYMA.0705.pdf ( 6 pages )(24832 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Casey L. Griffith/
Name	Casey L. Griffith
Date	09/30/2009



1. Registrant has obtained U.S. Registration No. 3,536,481 for the mark “METHYLBURN” for “dietary supplements” in International Class 005 and claims a first date of use of March 1, 2008.

2. Petitioner is engaged in the nutritional supplement business and provides dietary and nutritional supplement products to the general public both within the United States and worldwide. Petitioner has obtained U.S. Registration No. 2,629,349 for the mark “DYMA-BURN” for “dietary and nutritional supplement” in International Class 005 and has been using the mark in commerce since at least April 7, 1999.

3. Petitioner has developed extensive goodwill throughout the United States with respect to its mark "DYMA-BURN." Petitioner has spent substantial sums in the advertising and promotion throughout the United States of the goods provided under the "DYMA-BURN" mark.

4. As a result of the expenditure of considerable sums for promotional activities, advertising, and by virtue of their goods, the Petitioner has garnered a valuable reputation for their "DYMA-BURN" mark.

5. Petitioner and Registrant use their marks on substantially similar products, namely dietary supplements.

6. If Registrant is permitted to retain the registration sought to be cancelled and thereby the prima facie exclusive right to use in commerce the mark “METHYLBURN” on the

same goods sold by Petitioner, confusion in trade is likely to result from the concurrent use of both marks. This confusion will result in great detriment to Petitioner, which has expended considerable sums and effort in promoting its mark. Purchasers are likely to consider the goods of Registrant sold under the mark “METHYLBURN” as emanating from Petitioner, and purchase such goods instead of those of Petitioner, resulting in loss of sales to Petitioner.

7. Further, concurrent use of the mark by Registrant and Petitioner may result in irreparable damage to Petitioner’s reputation and goodwill, if the goods sold by Registrant are inferior, since purchasers are likely to attribute the source of Registrant’s goods to Petitioner.

8. If Registrant is permitted to retain U.S. Registration No. 3,536,481, a cloud will be placed on Petitioner’s title in and to its exclusive trademark, “DYMA-BURN”, and on its right to enjoy the free and exclusive use thereof in connection with the sale of its goods, all to the detriment of Petitioner.

9. Moreover, Registrant fraudulently obtained its Registration. Specifically, Registrant fraudulently withheld information from the Examiner during prosecution. In the Office Action dated June 20, 2008, Examiner stated the following Request for Information:

In order to allow for proper examination of the application, including the final determination as to whether the mark is merely descriptive in relation to the goods/services, the applicant must submit samples of advertisements or promotional materials for the goods/services or, if unavailable, for goods/services of the same type. If such materials are not available, the applicant must describe the nature, purpose and channels of trade of the goods/services identified in the application. In addition, the applicant must state whether the mark has any meaning in relation to the goods/services.

(emphasis added).

10. The Examiner continued that the “Applicant must specify whether the wording ‘METHYLBURN’ has any significance in the dietary supplement industry trade or as applied to the goods/services described in the application.”

11. In response, Registrant made the following statements on July 30, 2008:

a) “Methylburn appearing in the mark has no significance in the relevant trade or industry or as applied to the goods/services listed in the application, no geographical significance, nor any meaning in a foreign language.”

b) “Methyl has no connection with fat.”

12. Registrant’s statements constitute fraud in light of statements by Registrant which state that “MethylBURN Extreme’s FastBurn Methylated Thermogenic Matrix quickly increases the release of norepinephrine to spark thermogenic fat incineration and mobilize fatty acids.” <http://www.musclemedsrx.com/methylburnextreme.html>. Such statements are contrary to the position presented to the Examiner described above, which was an attempt by Registrant to avoid a rejection.

WHEREFORE, PREMISES CONSIDERED, Petitioner deems that it is or will be damaged by Registration No. 3,536,481 and petitions for the cancellation thereof; and, that this Petition for Cancellation be sustained in favor of Petitioner.

Date: September 30, 2009

Respectfully submitted,

CARSTENS & CAHOON, LLP

s/ Casey L. Griffith

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COUNSEL FOR PETITIONER

**CERTIFICATE OF SERVICE**

I hereby certify that on September 30, 2009, I sent notification of this filing via **Certified Mail RRR # 7003 2260 0003 2281 8000** to the following Attorney of Record:

**Attorney for Registrant**

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s/ Casey L. Griffith  
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